FOIA EXEMPTIONS

- FOIA is a disclosure statute.
- Information is considered to be releasable UNLESS it falls under one or more of the nine FOIA exemptions [(b)(1) through (b)(9)]

REASONABLY SEGREGABLE INFORMATION

- The Courts have ruled that all reasonably segregable information in a record should be released.

ROLE OF LITIGATION

- The Courts hear many cases each year that seek to challenge the Government's use of a FOIA exemption. As a result, numerous court decisions have defined the scope of FOIA exemptions. The Justice's FOIA and PA Overview Guide discusses the exemptions in depth.

ROLE OF LEGISLATION

The Congress has modified the scope of exemption (b)(7) twice: 1976 and again in 1986.

ROLE OF ADMINISTRATION

- The Attorney General of each administration usually sets forth his/her interpretations of the scope of certain FOIA exemptions.
  - Low (b)(2)
  - Exemption (b)(5)

ROLE OF DEPT OF DEFENSE

- Since 9/11, the Secretary of Defense has redefined what information is given out regarding his personnel.
- We've also seen more withholdings under exemption (b)(1), (b)(2), (b)(3), (b)(6)

EXEMPTION (b)(1)

- This exemption protects information that is currently and properly classified by Executive Order (E.O.) from release.
- Current E.O. is 12958
- SECNAVINST 5510.36 implements the E.O. and we have numerous OPNAVINSTs that set forth specific classified guidance regarding a myriad of subjects.

OPNAVINSTS

- C5513.2: Air Warfare Programs
- S5513.3: Surface Warfare Programs
- S5513.4: General Intelligence, Cover and Deception, Security and Investigative Programs
- S5513.5: Undersea Warfare Programs
- ETC ETC ETC (See page 5-2 of SECNAVINST 5510.36, 17 Mar 99)

REASONABLY SEGREGABLE

- Most classified documents are paragraphed marked. Under the reasonably segregable standard, you must release all information that is not classified and for which another FOIA exemption does not apply.

EXEMPTION (b)(2)

- Pertains to matters related solely to internal personnel rules and practices, which if released, would circumvent how the Navy does business.

LOW (b)(2)

- Internal matters of a relatively trivial matter (i.e, parking facility rules, lunch hour rules, sick leave policy, file numbers, mail routing stamps, initials, etc).

High (b)(2) - Risk of Circumvention

- Internal matters of a far more substantial nature the disclosure of which would risk the circumvention of a statute or agency regulation.
  - Usually refers to law enforcement manuals containing sensitive staff instructions
  - Also refers to internal administrative and personnel matters, including law enforcement manuals, to the extent that disclosure would risk circumvention of an agency regulation or impede the effectiveness of an agency's law enforcement activities.

IN CROOKER…

- DC Circuit fashioned a 2 part test:
  - Document be predominantly internal
  - That its disclosure “significantly risks circumvention of agency regulations or statutes

ANTI-CIRCUMVENTION ASPECT OF (b)(2)

- Public interest in disclosure is legally irrelevant.
- FOIA disclosure should not benefit those attempting to violate the law or avoid detection.

VULNERABILITY ASSESSMENTS

- HIGH (b)(2) used to protect vulnerability assessments that address an agency's vulnerability to some form of outside interference or harm by identifying those programs or systems deemed the most sensitive and describing specific security measures that can be used to counteract the vulnerabilities.

CRITICAL INFRASTRUCTURE INFO

- THE NEED TO PROTECT CRITICAL SYSTEMS, FACILITIES, STOCKPILES, AND OTHER ASSETS FROM SECURITY BREACHES AND HARM

COMMON USES OF HIGH (b)(2)

- Law enforcement manuals
- Crediting plans
- Unclassified security classification guides
- Vulnerability assessments

EXEMPTION (b)(3)

- INFORMATION WHICH IS PRECLUDED FROM RELEASE BY ANOTHER STATUTE.
  - List of (b)(3) statutes appear at www.foia.navy.mil (Resource Materials)

10 USC 130(b)

- Restricts disclosure of names and duty station addresses of defense employees that are assigned to sensitive, routinely deployable, and/or overseas units

EXEMPTION (b)(4)

- Information submitted by an outside party which is trade secret/proprietary in nature and submitted with an under-standing of confidentiality.

NATIONAL PARKS

- Impairment Prong: disclosure would impair the Government's ability to obtain necessary information in the future

- Competitive Harm Prong: disclosure would cause substantial harm to a competitive interest of the submitter.

CRITICAL MASS

- Established a distinction between voluntary and required submissions:
  - Voluntarily submitted information is categorically protected if not “customarily” disclosed to the public. Burden is on the Government.

E.O. 12600

- Submitter notice
  - Advise requester of request
  - Afford reasonable time to object to disclosure
  - Provide written notice of any intent to override objection

EXEMPTION (b)(5)

- Intra or inter-agency memoranda which, if released, would jeopardize a governmental issue.
  - Predecisional; advice; recommendations
  - Attorney work product
  - Attorney client privilege
  - Not made available to a party in litigation with the agency

EXEMPTION (b)(6)

- Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy
  - Requires a balancing of the public's right to know against the individual's right to privacy

EXEMPTION (b)(6)

- If no privacy interest is found, further analysis is unnecessary and the information must be disclosed.
- If a privacy interest is found to exist, the public interest in disclosure, if any, must be weighed against the privacy interest in non-disclosure.

NO EXPECTATION OF PRIVACY

- Examples: Titles, grades, salaries, duty stations, qualifications re position held, rank, awards and decorations, etc.
- FOIA requesters (except when making a first party request) do not have an expectation of privacy. We do protect their home addresses, etc.
- Information that is particularly well known.

NO EXPECTATION OF PRIVACY

- Information a person makes public on him/herself
- Corporations and business associations

PRACTICAL OBSCURITY

Information that was once public, but now hard to obtain is considered to be practically obscure and the individual now has an interest in keeping it private.

- (b)(6) is applicable

SURVIVOR PRIVACY

- Supreme Court held in Favish that surviving family members' right to privacy with respect to several death scene images. This involved death scene photos of Deputy White House Counsel Vincent Foster.

PRIVACY FOR PUBLIC FIGURES

- ALTHOUGH ONE'S STATUS AS A PUBLIC FIGURE MIGHT IN SOME INSTANCES ACTOR INTO THE PRIVACY BALANCE, A PUBLIC FIGURE DOES NOT, BY VIRTUE OF HIS STATUS, FORFEIT ALL RIGHTS TO PRIVACY.

PUBLIC INTEREST

- THE BURDEN OF ESTABLISHING THAT DISCLOSURE WOULD SERVE THE PUBLIC INTEREST IS ON THE REQUESTER.
- MUST SHED LIGHT ON AN AGENCY'S PERFORMANCE OF ITS STATUTORY DUTIES.

PUBLIC INTEREST

- Supreme Court has repeatedly stressed: Information that does not directly reveal the operations or activities of the federal government falls outside the ambit of the public interest that the FOIA was enacted to serve.

LANDMARK CASE – REPORTERS COMMITTEE

- 1989 Supreme Court case that changed the face of privacy.
  - Case involved FOIA requests from members of the news media for access to any criminal history record, known as “rap sheets” maintained by the FBI regarding certain persons alleged to have been involved in organized crime and improper dealings with a corrupt Congressman.

REPORTERS COMMITTEE

- Requester's identity is irrelevant unless they are seeking information about themselves
- Requester's interest is irrelevant, except when needed to consider a request for waiver or reduction of fees
-

THINGS WE PROTECT

- SOCIAL SECURITY NUMBERS
- HOME ADDRESSES
- BASE ADDRESSES (EVEN WITHOUT NAMES OF OCCUPANTS)
- NAMES
- DATE OF BIRTH
- DEROGATORY INFORMATION

EXEMPTION (b)(7)

- PROTECTS FROM DISCLOSURE RECORDS OR INFORMATION COMPILED FOR LAW ENFORCEMENT PURPOSES, BUT ONLY TO THE EXTENT THAT:
  - (b)(7)(A): COULD REASONABLY BE EXPECTED TO INTERFERE WITH ENFORCEMENT PROCEEDINGS

(b)(7)

- (b)(7)(B) – would deprive a person of a right to a fair trial or impartial adjudication
- (b)(7)(C) – could reasonably be expected to constitute an unwarranted invasion of personal privacy

(b)(7)

- (b)(7)(D) – could reasonably be expected to disclosure the identity of a confidential source
- (b)(7)(E) – would disclose techniques and procedures for law enforcement investigations or prosecutions or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law

(b)(7)

- (b)(7)(F) – could reasonably be expected to endanger the life or physical safety of an individual.

(b)(8)

- (b)(8) – protects matters that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

(b)(9)

- (b)(9) – covers geological and geophysical information and data, including maps, concerning wells.

REDACTION TECHNIQUES

- ELECTRONIC REDACTION PREFERRED
- NO BLACK MARKERS!
- SEE POLICY MEMO AT FOIA.NAVY.MIL (RESOURCE MATERIALS)
- ELECTRONIC MEDIA CAN RECREATE INFORMATION THAT APPEARS TO BE WITHHELD